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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Ruth Ross, ) No. CV-08-701-PHX-MHM  
10 Plaintiff, ) **ORDER**  
11 vs. )  
12 )  
13 Lory Toon, et al., )  
14 Defendant. )  
15 \_\_\_\_\_ )  
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17 Currently pending before the Court is Plaintiff/Counter-Defendant Ruth Ross' Motion  
18 to Remand (Dkt.#30.), and Motion for Ruling Request (Dkt.#42.), as well as  
19 Defendant/Counter-Claimant Lory Toon's Motion for an Automatic Stay and Notice of  
20 Filing Bankruptcy. (Dkt.#41.) After reviewing the pleadings and determining oral argument  
21 unnecessary, the Court issues the following Order.

22 **I. BACKGROUND**

23 On April 10, 2008 Defendants Lory and David Toon removed Plaintiff Ruth Ross'  
24 Complaint to federal court. (Dkt.#1.) Ross asserts claims against David and Lory Toon, who  
25 are husband and wife, for fraud, breach of contract, conversion, identity theft, breach of the  
26 covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment. On  
27 April 24, 2008, David and Lory Toon answered Ross' Complaint, and at the same time Lory  
28 Toon asserted various counter-claims against Ross for defamation, intentional infliction of

1 emotional distress, negligent infliction of emotional distress, malice, harassment, and breach  
2 of contract. On January 5, 2009, Ross filed a motion to remand the case back to Arizona  
3 state court. On April 8, 2009, Lory Toon filed a notice with the Court that she had filed for  
4 bankruptcy in the Middle District of Florida. Ms. Toon has also made filings requesting the  
5 Court impose an automatic stay on the instant proceedings.

## 6 **II. THE EFFECT OF LORY TOON'S BANKRUPTCY FILING**

7 11 U.S.C. § 362(a) automatically stays a wide array of collection and enforcement  
8 proceedings against the debtor and his or her property. The stay is self-executing and is  
9 effective upon the filing of the bankruptcy petition. See 11 U.S.C. § 362(a); In re The  
10 Minoco Group of Co., 799 F.2d 517, 520 (9th Cir. 1986). The scope of the automatic stay  
11 is set forth in a series of overlapping provisions in § 362(a). The stay bars the  
12 commencement or continuation of any judicial, administrative or other action against the  
13 debtor that was or could have been commenced before the commencement of the bankruptcy  
14 case or to recover a claim against the debtor that arose before the bankruptcy case. 11 U.S.C.  
15 362(a).

16 In the instant case, Lory Toon has filed for bankruptcy, but her husband David Toon  
17 has not. Therefore, as a matter of course, Plaintiff Ross' claims against Lory Toon are  
18 subject to the automatic stay provision of 11 U.S.C. § 362(a), while Ross' claims against  
19 David Toon are not. With respect to the Counter-Complaint that has been filed against Ross,  
20 the Court notes that the claims contained in the Counter-Complaint have only been asserted  
21 by Lory Toon; David Toon does not appear to be a party to the Counter-Complaint. This is  
22 because the only parties that are named in the Counter-Complaint are Ruth Ross as  
23 Defendant and Lory Toon as Plaintiff. In fact, the document specifically states that "[f]or  
24 her counter complaint Toon alleges as follows;" in addition, the only Parties that are  
25 mentioned at all are Ruth Ross and Lory Toon. (See Dkt.#5, p. 6.) (emphasis added).  
26 Accordingly, since David Toon is not a counter-claimant, the Counter-Complaint in its  
27 entirety is also subject to the automatic stay provision of 11 U.S.C. § 362(a).  
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1 In light of Lory Toon’s Florida bankruptcy filing, the only claims that may proceed  
2 forward in this case are Ruth Ross’ claims against David Toon.

### 3 **III. RUTH ROSS’ MOTION TO REMAND**

4 The removal statute authorizes the defendant to remove to federal court “any civil  
5 action brought in a State court of which the district courts of the United States have original  
6 jurisdiction.” 28 U.S.C. § 1441(a). In other words, “[o]nly state court actions that originally  
7 could have been filed in federal court may be removed to federal court by the defendant.”  
8 Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). The party invoking the removal  
9 statute—generally the defendant—bears the burden of establishing federal jurisdiction. See  
10 Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1393 (9th Cir. 1988). Courts strictly  
11 construe the removal statute against removal. Id. Remand to state court is controlled by §  
12 1447, which reads “[i]f at any time before final judgment it appears that the district court  
13 lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c).

14 Section 1332(a) vests the district courts with “original jurisdiction of all civil actions  
15 where the matter in controversy exceeds the sum or value of \$ 75,000, exclusive of interest  
16 and costs, and is between” diverse parties. See 28 U.S.C. § 1332(a). Despite the statute's  
17 silence, the Supreme Court has held that § 1332 requires complete diversity of citizenship.  
18 Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553 (2005) (“In a case with  
19 multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff  
20 from the same State as a single defendant deprives the district court of original diversity  
21 jurisdiction over the entire action.”) (internal citations omitted). In order to establish  
22 citizenship in a state for the purpose of diversity jurisdiction, a person must (1) be a United  
23 States citizen, and (2) be domiciled in a State. Lew v. Moss, 797 F.2d 747, 749 (9th Cir.  
24 1986).

25 A person's domicile is determined by that person's “permanent home, where she  
26 resides with intention to remain or to which she intends to return.” Kanter v. Warner-Lambert  
27 Co., 265 F.3d 853, 857 (9th Cir. 2001). A person's domicile is distinct from residency. See  
28 Weible v. United States, 244 F.2d 158, 163 (9th Cir. 1957) (“Residence is physical, whereas

1 domicile is generally a compound of physical presence plus an intention to make a certain  
2 definite place one's permanent abode.”). The Ninth Circuit has stated that the factors used  
3 to determine domicile are “current residence, voting registration and voting practices,  
4 location of personal and real property, location of brokerage and bank accounts, location of  
5 spouse and family, membership in unions and other organizations, place of employment or  
6 business, driver’s license and automobile registration, and payment of taxes.” Lew, 797 F.2d  
7 at 750. The Ninth Circuit has also recognized that there is a “presumption in favor of an  
8 established domicile as against a newly acquired one.” Id. at 751.

9       There is no dispute that the amount in controversy is over \$75,000. The only issue  
10 before the Court with respect to the remand motion is whether there is a complete diversity  
11 of citizenship between Ross and David Toon: it is undisputed that the named Toon is a  
12 citizen of the State of Arizona. The more problematic inquiry relates to the citizenship of  
13 Ruth Ross.

14       Ross argues that remand is appropriate here because she is “stateless” for purposes  
15 of § 1332. Having moved to Iraq in 2004 as part of her employment as a civilian contractor  
16 with Kellogg Brown & Root, Inc. (“KBR”), Ross claims that she is not domiciled in any  
17 state. Ross argues that to the extent that she has a discernable domicile, it is in the country  
18 of Iraq.

19       In support of this contention, Ross cites to the U.S. Supreme Court case of Newman-  
20 Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989). In Newman-Green, the Supreme Court  
21 determined “an American citizen who lived overseas, fell within none of the statutory  
22 categories of parties over whom the federal courts may exercise diversity jurisdiction.  
23 Because he was not domiciled in any state, this defendant was ‘stateless’ for purposes of the  
24 diversity statute, and, under the strictures of § 1332, the plaintiff could not pursue an action  
25 in federal court against him.” Lee v. Am. Nat’l Ins. Co., 260 F.3d 997, 1005 (9th Cir. 2001).

26       Like the “stateless” actor in Newman-Green, Ross contends that complete diversity  
27 of citizenship for purposes of § 1332 cannot be maintained on the facts here, because Ross  
28 has no discernable domicile in any specific state. See id. (“In order to be a citizen of a State

1 within the meaning of the diversity statute, a natural person must both be a citizen of the  
2 United States and be domiciled within the State.”).<sup>1</sup> In her remand motion, Ross claims that  
3 since 2004 she has been almost continuously stationed in Iraq and has returned to the United  
4 States for only transient interruptions in her work schedule. Ross further claims that she owns  
5 property in Maricopa County, Arizona, which she has yet to live in, but that she intends to  
6 reside in her Arizona home once her work for KBR concludes. Ross also notes that while she  
7 has previously lived in California she has not registered to vote there; though Ross  
8 acknowledges that she maintains a bank account in California, but generally accesses it  
9 through the internet. Lastly, Ross alleges that upon her most recent return to the United States  
10 from Iraq in July 2008, she has been living with an acquaintance in Texas and that she will  
11 remain at this address until she returns to Iraq after receiving a new work assignment from  
12 her employer.

13 As a preliminary matter, because David Toon is a resident of the State of Arizona, in  
14 order to maintain diversity jurisdiction, it must be proven that Ross is domiciled in some  
15 specific state other than Arizona. Furthermore, as the Party invoking the Court’s jurisdiction,  
16 David Toon bears the burden of demonstrating the existence of subject matter jurisdiction,  
17 by proving Ross’ specific domicile.

18 Toon claims that the evidence presented supports an inference that Ross is domiciled  
19 in California, thereby meeting the requirement of complete diversity of citizenship between  
20 the Parties for purposes of diversity jurisdiction under § 1332. To support this contention,  
21 Toon points to the fact that Ross has a valid California drivers license which does not expire  
22 until 2010, and that she has registered two automobiles (a truck and a motorcycle) in  
23 California. Toon further maintains that Ross has an active bank account in California and  
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25 <sup>1</sup>Furthermore, although under § 1332 diversity jurisdiction also exists between citizens  
26 of a State and citizens or subjects of a foreign state, a United States citizen domiciled abroad  
27 is not an alien or foreign subject for purposes of diversity jurisdiction. Newman-Green, 490  
28 U.S. at 828 (“Subsection 1332(a)(2), which confers jurisdiction in the District Court when  
a citizen of a State sues aliens only, also could not be satisfied because [defendant] is a  
United States citizen [living abroad].”).

1 that she has used a California address on various KBR employment forms. Toon also alleges  
2 that Ross has filed at least one federal income tax document listing a California location as  
3 her home address, and that she has multiple children and grandchildren already living in  
4 California.

5 Ross has responded to Toon's allegation of a California domicile by claiming that the  
6 two vehicles in question actually belong to her friend, Bill Herron. According to Ross, the  
7 vehicles were registered in her name only because Herron was unemployed at the time of  
8 registration and was not creditworthy, and that by registering the vehicles in her name Ross  
9 was doing Herron a favor.<sup>2</sup> Ross also notes that one of the two vehicles is a motorcycle, and  
10 she has never held a drivers licence that would authorize her to operate a motorcycle. Ross  
11 also claims that Herron has been making payments on the vehicles. With respect to the  
12 California address, Ross contends that she was required to list an actual physical address on  
13 her KBR employment form and the address listed belongs to Herron, and Ross does not live  
14 on the premises. With respect to the fact that her children live in California, Ross contends  
15 that her children are all adults and do not require her supervision.

16 It is worth first noting that Ross' contention of being domiciled in Iraq is without  
17 merit. As previously stated, domicile means physical residency plus a showing of intent to  
18 reside at that location permanently. See Kanter, 265 F.3d at 857. Although Ross has worked  
19 as a civilian contractor in Iraq since 2004, she is not a citizen of Iraq and Ross has not  
20 expressed an intent to make that country her permanent home. Furthermore, it is not  
21 altogether clear that Ross would be legally permitted under the laws of either the United  
22 States or Iraq to make that country her permanent home, even if she so desired.

23 The question of where Ross is domiciled within the United States is a much more  
24 difficult issue. Certainly, Ross has ample connections to the State of California: her adult  
25 children live there, she has held a California issued drivers licence, a bank account, has

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27 <sup>2</sup>Ross further contests the accuracy of the Toon's representations regarding the truck,  
28 which she claims has always been registered in the State of Texas and carries Texas license  
plates.

1 registered two vehicles in that state, has filed a federal tax return from there, and has even  
2 rented California property. At the same time, Ross has purchased a house in Arizona and has  
3 demonstrated a desire to permanently reside at this property upon the completion of her work  
4 obligations for KBR in Iraq. Also, Ross presently lives in Texas while awaiting a new  
5 assignment in Iraq. Because of the conflicting factual submissions that have been made to  
6 the Court, there is enough evidence for the Court to conclude that Ross is indeed “stateless,”  
7 such that she lacks a discernable state in which she is domiciled for purposes of § 1332. In  
8 any event, it is not Ross’ burden to prove a domicile. That task falls to the party who is  
9 invoking the Court’s jurisdiction, David Toon. See Kokkonen v. Guardian Life Ins. Co. of  
10 Am., 511 U.S. 375, 377 (1994) (the removing party bears the burden of establishing subject  
11 matter jurisdiction, and a court must presume lack of jurisdiction until that party establishes  
12 otherwise).

13 As such, Toon has not presented sufficient evidence for the Court to conclude that  
14 Ross either currently resides in California or that she intends to make California her  
15 permanent home. For that reason, the Court cannot conclude that its subject matter  
16 jurisdiction has been properly invoked in this matter. Therefore, the instant lawsuit shall be  
17 remanded back to the court of competent jurisdiction, which is Maricopa County Superior  
18 Court in the State of Arizona.

19 **Accordingly,**

20 **IT IS HEREBY ORDERED** granting Plaintiff’s Motion to Remand. (Dkt.#30.)

21 **IT IS FURTHER ORDERED** denying as moot Plaintiff’s Request for Ruling, or in  
22 the alternative, notice of readiness for Pretrial Conference. (Dkt.#42.)

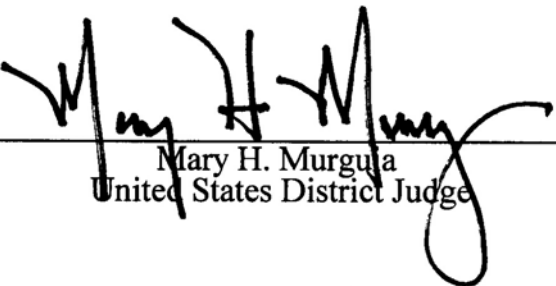
23 **IT IS FURTHER ORDERED**, to the extent that it is consistent with this Order,  
24 granting Defendants’ Motion for an Automatic Stay. (Dkt.#41.)

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1           **IT IS FURTHER ORDERED** directing the Clerk to remand the instant case back  
2 to Maricopa County Superior Court.

3           DATED this 10<sup>th</sup> day of September, 2009.

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Mary H. Murgula  
United States District Judge